Supreme Court, U. S.
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No. 78-654

In the Supreme Court of the United States

OCTOBER TERM, 1978

BEN DeLUCA,

Petitioner,

vs.

HAROLD ROBERTSON, ELDRED SWANSON, EUGENE ATEN, SR., and MARVIN DANIEL, Individually and as Aldermen of the City of Franklin,

Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the 7th Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. In this action under 42 U.S.C. 1983, did the petitioner make out a prima facie case showing that he had been denied Due Process at the hearing which resulted in his discharge for cause from public employment?

2. Should the decision of the Wisconsin Supreme Court that the petitioner was afforded Due Process of law and an impartial decisionmaker be given "full faith and

credit'' in the federal courts pursuant to the provisions of 28 U.S.C. 1738?

3. Is the petitioner's action barred by res judicata?

STATEMENT OF THE CASE

The petitioner served as the Clerk of the City of Franklin from January 16, 1966 until September 5, 1972. City officials, such as the petitioner, who are appointed by the Mayor and subject to confirmation by the Common Council, can be removed from office only for cause upon the affirmative vote of three-fourths of all of the members of the Commons Council. *Wis. Stats. Sec.* 17.12(1) (c)&(d) Any resident and taxpayer of the city may initiate removal proceedings. The Common Council is then required to investigate and hear the charges, but may first require the complainant to post a bond for costs. *Wis. Stats. Sec.* 17.16(3)&(4)

On September 5, 1972, the respondents, four of the six aldermen of the city, introduced a petition to initiate removal proceedings. The Mayor suspended the petitioner from office pending the outcome of the hearing and appointed the Common Council as a committee of the whole to investigate the charges. The respondents, Marvin Daniel, an attorney, and Harold Robertson, the President of the Council, assumed the primary responsibility for the investigation. (Tr. pp. 196-199) On September 25, 1972, the President of the Common Council filed formal charges against the petitioner. (Ex. 155, pp. 81-83) These charges were verified as required by statute. *Wis. Stats. Sec.* 17.16(3)

The removal hearing was held on November 13, 14 and 15, 1972. Immediately prior to the commencement of the hearing, the petitioner submitted a written motion to disqualify the four respondents on the ground that they had signed the petition to initiate removal proceedings. The petitioner also moved to disqualify the respondent, Harold Robertson, on the additional ground that he had filed the formal charges. (Ex. 155, pp. 98-99) This motion was denied.

On January 3, 1973, the Common Council submitted its Findings of Fact and Conclusions of Law and ordered the petitioner removed from office. (Ex. 5) All six of the aldermen initially voted to remove Mr. DeLuca from office, but Alderman Januszewski abstained from the final vote for reasons undisclosed by the record. (Tr. pp. 237-239)

The petitioner sought review of his discharge by way of a common law writ of certiorari in the Circuit Court of Milwaukee County. In a lengthy 21 page petition, Mr. DeLuca alleged numerous violations of state law, the Wisconsin Constitution, and the Constitution of the United States of America. (Ex. 155, pp. 1-21) On January 21, 1974, the Circuit Court of Milwaukee County entered an order quashing the writ. Mr. DeLuca appealed to the Wisconsin Supreme Court. While that appeal was pending, Mr. DeLuca commenced this action. On June 2, 1976, the Wisconsin Supreme Court affirmed the order quashing the writ of certiorari. *State ex rel. DeLuca* v. *Common Council*, 72 Wis.2d 672, 242 N.W.2d 689 (1976)

The trial of this action was held on August 22 and 23, 1977. At the close of petitioner's case, the District Court granted the respondents' motion to dismiss on the grounds that the petitioner had failed to make a *prima facie* case and on the alternative ground that the action was barred by res judicata. The United States Court of Appeals of the Seventh Circuit held that the action was barred by the

principles of res judicata and collateral estoppel without deciding whether the petitioner had made out a *prima facie* case.

The petitioner has commenced five actions in the state courts challenging the propriety of the procedures leading to his suspension and eventual discharge from office. Four of these actions have been dismissed. One action is still pending in which the petitioner claims that the respondents and Alderman Mayer defamed him by publishing the Common Council's Findings of Fact and Conclusions of Law. (Ex. 156-166, Tr. pp. 63-65)

WHY THE WRIT SHOULD BE DENIED

I.

THE PETITIONER FAILED TO MAKE OUT A PRIMA FACIE CASE

The petitioner must not only show that the Court of Appeals misapplied the doctrine of res judicata but also that he has made out a *prima facie* case in order to overturn the dismissal of his action. The petitioner does not make any argument in support of his suggestion that the District Court erred in determining that he failed to make out a case. The petitioner's Statement of the Case omits a number of salient facts, such as the petitioner's opinion that the defendants tended to vote as a block is unsupported by the Common Council minutes (Ex. 182-189), *Wis. Stats. Sec.* 66.77 (1971), the Wisconsin's Open Meeting Law, was a directory statute which did not provide for any penalties for its violation, the respondents had a right to commence removal proceedings because they were citizens and taxpayers, and not because they were public officials, and the petitioner did not think any of the aldermen were biased except Alderman Robertson. The petitioner felt that Alderman Robertson was biased only because of some dispute in 1970 or 1971 over the specifications for an electrical generator. (Tr. pp. 17-18, 129-132)[1]

[1] On July 15, 1977 the petitioner testified that the city never purchased the generator. He swore at the trial on August 22, 1977 that the Common Council approved the purchase of the generator despite his objections. (Tr. pp. 119-120, 125)

II.

THE ACTION IS BARRED BY RES JUDICATA

The petitioner correctly asserts that the Wisconsin Supreme Court was "confined . . . to a review of the record" of the administrative proceeding. The petitioner would have a legitimate grievance if the Wisconsin Supreme Court had decided his case on the basis of facts outside of the record. The petitioner, however, is simply wrong in asserting that state procedures precluded him from raising any constitutional issue. The Common Council never prevented the petitioner from making any motion or raising any objection to its procedures. Any alleged violation of Due Process may be reviewed by a common law writ of certiorari. *State ex rel. Wasilewski* v. *Board of School Directors*, 14 Wis.2d 243, 263, 111 N.W.2d 198 (1961) The petitioner's present complaint about the inadequacy of state procedures is somewhat inconsistent with his previous actions in commencing five suits in the state courts.

The petitioner was not denied a full and fair hearing in the state courts because the Wisconsin Supreme Court refused to consider some of his objections which were made long after the removal hearing. Neither state nor federal law permits the disqualification of a decisionmaker for reasons that were known, or should have been known, but were never advanced at the original hearing. *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-16 (C.A. 4, 1974); *Lloyd A. Fry Roofing Co.* v. *F.T.C.*, 371 F.2d 277, 286 (C.A. 7, 1967) Nevertheless, the Wisconsin Supreme Court did consider some of the petitioner's objections which were first asserted after the removal hearing. The Court said:

> On appeal to this court, it was claimed for the first time that some of the aldermen should have been disqualified because they were involved in personal disputes with DeLuca. This objection was not timely raised and will not be dealt with.
>
> It should also be pointed out that DeLuca claimed, for the first time in his petition for a writ of certiorari, that the two aldermen, Robertson and Daniel, had investigated the charges and they, therefore, were disqualified from further proceedings. These objections which were not made at the removal hearing cannot be made for the first time in the court proceedings on certiorari. We discussed the contention only because the issue is one of probable continuing public interest. (72 Wis.2d at 692)

The petitioner has had his day in court on all the issues that were raised or could have been raised in the Wisconsin Supreme Court despite that court's refusal to discuss the merits of some of the issues because of the petitioner's procedural defaults. *Mertes* v. *Mertes*, 411 U.S. 961, 93 S.Ct. 2141, 36 L.Ed.2d 681 (1973) (Summarily affirming decision of three-judge court, 350 F.Supp. 472 [D.Del. 1972])

III.

THE PETITIONER IS COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUES RAISED IN THE COMPLAINT

The petitioner has claimed that this case involves a different cause of action for the purposes of res judicata because of the presence of a new allegation that the defendants were "acting in concert". A cause of action is usually more broadly defined for the purposes of res judicata than for the purposes of pleading. Even if one were to indulge in the dubious assumption that this case involves a

different cause of action for the purposes of res judicata, the present action would still be barred by the doctrine of collateral estoppel. The Wisconsin Supreme Court determined that the petitioner had been afforded Due Process and specifically held that the Common Council was an impartial decisionmaker.

IV.

THE PETITION DOES NOT PRESENT ANY IMPORTANT FEDERAL QUESTION

Some courts have been hesitant to hold that a civil rights action is barred by res judicata where the state litigation was involuntary as to the plaintiff or where the constitutional issues could have been raised in the state courts but were not. e.g. *Thistlethwaite* v. *City of New York,* 497 F.2d 339 (C.A.2, 1974), cert. den. 419 U.S. 1093, 95 S.Ct. 686, 42 L.Ed.2d 686; *Lombard* v. *Bd. of Ed. of City of New York,* 502 F.2d 631 (C.A.2, 1974), cert. den. 420 U.S. 976, 95 S.Ct. 1400, 43 L.Ed.2d 656; cf. *Blankner* v. *City of Chicago,* 504 F.2d 1037 (C.A.7, 1974) cert. den. 421 U.S. 948, 95 S.Ct. 1678, 44 L.Ed.2d 101; reh. den. 422 U.S. 1029, 95 S.Ct. 2618, 45 L.Ed.2d 686; *Scoggin* v. *Schrunk,* 522 F.2d 436 (C.A. 9, 1975), cert. den. 423 U.S. 1066, 96 S.Ct. 807, 46 L.Ed.2d 657.

In contrast, this petitioner has freely elected to commence several actions in the state courts where he relied upon both the State and Federal Constitutions. This action would be barred even if one were to adopt the most restrictive view as to the proper application of res judicata in civil rights actions. The petitioner does not claim that the Circuit Court of Appeals' decision conflicts with a decision from any other Circuit. The petitioner's claim that he was denied a fair trial in the state courts is refuted by the record. The petitioner does not advance any other reason

why this action should not be barred by res judicata or why the decision of the Wisconsin Supreme Court should not be given "full faith and credit" in the federal courts pursuant to 28 U.S.C. 1738. The present action is a wholly inappropriate vehicle to resolve any possible inconsistencies between the opinions of the various Circuit Courts of Appeals.

V.

THE PETITIONER SHOULD NOT BE AFFORDED STANDING TO ATTACK RULE 35 OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Rule 35(d)(3) of the United States Court of Appeals for the Seventh Circuit provides:

> Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for disposition of appeals as set forth in this rule.

The petitioner never made a motion to have the decision printed and should not be afforded standing in this Court to complain. It is immaterial to respondents, part time public officials, whether the decision is published. No case or controversy exists between the parties in respect to the validity of Rule 35. The petitioner's dispute is with the Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents